Petition

81-1096

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

FRANK G. EUBANK, JR.
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

WILLIAM B. CUMMINGS
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Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Was the warrantless search of Petitioner's home by a friend acting as an agent of the police a violation of Petitioner's Fourth Amendment rights, requiring the exclusion of all evidence obtained pursuant to a subsequently executed search warrant?

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JURISDICTION

Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, of three counts of receiving stolen property. His timely petition for appeal was refused by the Virginia Supreme Court on September 21, 1981, without opinion. Petitioner timely filed a petition for rehearing on October 5, 1981, which was denied by the Virginia Supreme Court on October 13, 1981, without opinion. This Court has statutory authority to review the judgment by certiorari pursuant to 28 U.S.C. § 1257(3).

Constitutional Provision Involved

This case involves a violation of petitioner's rights secured by Amendment IV, United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was arrested on January 25, 1980, and charged with five counts of receiving stolen property. The charges stem from the execution of a search warrant at his house on that date and from the allegations of one Mark Neal, who allegedly sold the stolen property to Eubank.

Petitioner was found guilty of three counts of receiving stolen property in two separate trials in the Circuit Court of

Fairfax County, Virginia.* Eubank was fined $1,000 on the first charge (No. 31475) and sentenced to serve seven and ten years in the penitentiary, such sentences to run concurrently, on the second and third charges (Nos. 31473 and 31474).

The first trial (No. 31475) ended on October 3, 1981, when the jury returned a guilty verdict.

The second trial commenced on October 28, 1980. On this date it was learned for the first time that the Commonwealth's chief witness, Mark Neal, had entered Eubank's home at the request and direction of the Fairfax County Police and conducted a warrantless, surreptitious search for property

---

*One indictment was dismissed, another nol prossed.

he had stolen. (Testimony of Mark Neal, Trial, Oct. 28, 1980, at 160):

> BY MR. HURD
>
> Q. When was the last time you saw it [referring to an item of stolen property]?
> A. I went over to Frank Eubank's house for Investigator Cox. Investigator Cox asked me to go over to his house and see if I could find any stolen property and that was the last time I saw it.

On cross-examination Neal admitted that he had been arrested by the Fairfax County Police and charged with five counts of burglary. Neal, who has estimated that he has committed over one hundred burglaries, struck a bargain with the police: they would help him in court if he would conduct a warrantless search of Eubank's home and report to the police any stolen property he

could identify. (Testimony of Mark Neal, Trial, Oct. 28, 1980, pp. 207-210):

BY MR. RICHMOND:

Q. Now going back to 1979, shortly after you were arrested you say that you were requested, at the direction of, was it Investigator Cox, that you went into Mr. Eubank's house for the purpose of determining what was in there?

A. Yes, sir.

Q. Was this, say January of 1980?

A. Yes, sir.

Q. Just before the search warrant was obtained?

A. No, sir. Yes, sir, the day before the search warrant was obtained.

* * *

Q. So you had told the police before, after you were arrested, that you had taken stuff to his house, is that correct?

A. Yes, sir.

Q. And they told you that they wanted you to go in there to search his house, and come back and tell them what you found?
A. No, sir. They told me it would be better if I did. They could help me in Court.

On or about January 19 and/or 22, 1980, Neal appeared at Eubank's door, pursuant to his instructions from Investigator Cox. He informed Eubank, a family friend, that he needed money to pay a bondsman. On the pretext of a social visit Neal entered Eubank's home and conducted a warrantless search of the basement and upstairs living area of the home. (Testimony of Mark Neal, Trial, Oct. 28, 1980, pp. 208-209):

BY MR. RICHMOND:

Q. Did you go into Mr. Eubank's house?
A. Yes, sir.
Q. What day was that?
A. I don't remember the exact date. It was about the end of January.

Q. If I said it was the nineteenth of of January, would that be correct?
A. I couldn't tell you.
Q. Did you tell Mr. Eubank what your purpose was in being there?
A. Yes, sir, I did.
Q. Was he there; did he let you in the house.
A. Yes, sir.
Q. And where did you go in the house?
A. Went downstairs to the basement.
Q. Did he go with you?
A. Mr. Eubanks [sic] was there, yes, sir.
Q. What did you talk about?
A. I wanted to borrow money from him.
Q. For what?
A. I told him I had to pay the bondsman some money.
Q. Did you tell him what it was for?
A. I told him it was for the bondsman.

* * *

Q. So you went to him for help then?
A. No, sir, I didn't go to him for help.

Q. Well, then, it was a subterfuge, the reason you were in there; is that right?
A. Yes, sir.
Q. But you asked him for money for a bondsman?
A. Yes, sir.
Q. Because you had been arrested. When were you arrested?
A. December 27th.
Q. You got that right.
So then you went downstairs in the basement, and then you saw what was in the house, you say?
A. Yes, sir. I went upstairs and got a beer out of the refrigerator, and saw a television set, and saw what appeared to be the silver that was from the kitchen.

Neal's testimony came at the end of the first day's proceedings.

On October 29, 1980, at the beginning of the second day of the second trial, Eubank moved to suppress the evidence obtained during the execution of the search warrant because it was the fruit of the

illegal, unconstitutional search by Mark Neal. This motion was denied as was a motion for mistrial; exceptions were duly noted for the record. (See excerpts from trial transcript, Appendix A.)

The motions having been denied, the following testimony was elicited from Fairfax County Police Investigator Roger Cox. (Testimony of Roger Cox, Trial, Oct. 29, 1980, pp. 135-138):

BY MR. RICHMOND:

Q. Investigator Cox, on the search warrant that you had, prior to getting that search warrant did you talk with one Mark Neal?
A. Prior to getting the search warrant?
A. Yes.
A. Yes, sir, I did.
Q. He had been arrested at that time for larceny; is that correct?
A. He had been charged with burglary, yes.

Q. All right, several counts?
A. Yes, sir.
Q. How many burglaries do you think he's committed in this county?

* * *

A. I would say around 20, 25 that I know of.
Q. Around 25 that you know of.
All right, calling your attention to on or about January of 1980, did you tell him or ask him to go into the Eubank's house for the purpose of determining what articles he had in the house?
A. Yes.
Q. And, did you tell him that if he did that that you would help him in court, if possible?
A. No, sir.
Q. What did you tell him in regard, what instructions did you give him in that regard to that?
A. He had information that came to me through Mark Neal and other sources that property was stolen from these burglaries that were involved,

gone to Mr. Eubank's residence, and Mr. Eubank bought them on different occasions. At that time I asked him what, if any, property was in the house that he knew of. Okay, and how long had it been since they had been inside the home, and it had been several days, but, Mr. Eubank had been to Florida and at that time I asked him if he had intentions of going back into the home.

Q. Didn't you tell him to go back in the home and see what was in there on the 19th and the 22nd?

A. If you'll allow me, I'm coming to that.

Q. All right.

A. So, as we talked I asked him if he had any intentions of going back in the home, and he stated earlier that, I believe, that either he owed Mr. Eubank more money for some work, something of that nature, he said, he could get back in the home and talk to Mr. Eubank.

Q. Go ahead.

A. Okay, at that point I told him to go back in the home and when he got in there whatever he saw in that home

that he personally knew that was stolen that he had sold Mr. Eubank that I wanted to know about it.

Q. So, actually he was your agent at that time, wasn't he?

A. He went back in the home, yes.

Q. On your behalf, at your request?

A. I asked him, yes.

The second trial ended with a jury verdict of guilty on October 30, 1980.

Eubank renewed his objection to the evidence by motions to set aside the verdicts, which restated his objections made during the second trial and raised, for the first time, his objection to the evidence having been used in the first trial, basing his objection on the after-acquired evidence elicited in the second trial. The motions were denied. (See excerpts from hearing transcript, Appendix B.)

On December 12, 1980, Eubank was fined $1,000 and sentenced to serve seven and ten years in the state penitentiary, such sentences to run concurrently.

Eubank raised the Fourth Amendment issue in his Petition for Appeal to the Supreme Court of Virginia. His petition was refused, without opinion, on September 21, 1981. Rehearing was denied, without opinion, on October 13, 1981.

ARGUMENT

The Warrantless Search of Petitioner's Home by a Friend Acting as a Police Agent Violated Petitioner's Fourth and Fourteenth Amendment Rights; All Evidence Obtained Pursuant to a Subsequently Executed Search Warrant Should Have Been Excluded.

The very core of Fourth Amendment protection is the sanctity and security of

one's home. Payton v. New York, 445 U.S. 573, 585, 589-90 (1980). Although the Fourth Amendment has been applied in limited circumstances outside the home, nowhere is an individual's expectation of privacy from governmental intrusion greater than inside his home. Payton v. New York, supra at 585. Thus a search of one's home is constitutionally unreasonable and presumptively invalid when conducted without probable cause and without a search warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). This Court has fashioned few exceptions to the search warrant requirements and they remain tightly circumscribed to jealously guard the

security of a citizen's home, except in the most unusual emergency situations.*

When Mark Neal entered Eubank's home under the direction and control of the Fairfax County Police Department he was a police agent. The police were therefore bound by the Fourth Amendment's stringent requirement of obtaining a search warrant before gaining entry, via Neal, into Petitioner's home. Gouled v. United States, 255 U.S. 298 (1921).

These stringent requirements are no less applicable when the government uses not

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*The present case presents no "exigent" or emergency circumstances. The decision to use Neal to conduct the surreptitious search was made on or about December 29, 1979. The search was conducted on or about January 19, and/or 22, 1980. The police had over three weeks in which to obtain a search warrant.

force but deception to gain entry into one's home. In Gouled v. United States, supra, the Court stated:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights. Id. at 305-306.

This court has repeatedly reaffirmed that Gouled v. United States remains the controlling precedent in this area. Lewis v. United States, 385 U.S. 206, 211 (1966); Hoffa v. United States, 385 U.S. 293, 301 (1966). Further, Gouled is the only case decided by this Court which can be applied to the facts of the present case.

In Gouled, the government used an acquaintance of the defendant to enter defendant's office, on the pretext of a social visit, and, once having been admitted, to conduct a surreptitious search of the office outside defendant's presence. This Court unanimously concluded that the warrantless search and seizure violated the Fourth Amendment. The instant case is even more compelling because the area searched was

Eubank's home, the very heart of Fourth Amendment protection.

The facts in the case at bar are readily distinguishable from those in Lewis, supra, and Hoffa, supra, and the Court's holdings therein are so limited as to be inapplicable here. In Lewis an undercover police officer entered defendant's home and participated in an illegal drug transaction. Although the agent misrepresented his identity, the Court focused on the fact that the agent was admitted for the purpose of conducting an illegal transaction and that by converting his home into a commercial center for conducting illegal drug transactions, the defendant gave up his expectation of privacy. Here, Eubank neither invited Neal into his home for an illegal purpose nor

gave up his expectation of privacy in the home by converting it into a commercial center.

Likewise, Hoffa is distinguishable from the present case. In that case this Court concluded that the Fourth Amendment was not violated when a government informant repeated conversations he had had with a criminal suspect. Hoffa, however, involved only the limited question whether the Fourth Amendment protected "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa, supra at 302. In holding that conversations which took place outside of the defendant's home were not so protected, the Court made clear that the defendant's claim was not based on any asserted violation of

his right of privacy. Here, Eubank asserts a violation of the privacy of his home by a government agent conducting a warrantless search.

This Court has recently denied a writ of certiorari in Baldwin v. United States, ___ U.S. ___, 101 S. Ct. 1767 (1981), without opinion, two justices dissenting. In Baldwin v. United States, 621 F.2d 251 (6th Cir. 1980), the Court of Appeals held that seizures of cocaine by an undercover government agent posing as a live-in chauffer-handyman did not violate the defendant's Fourth Amendment rights. It is respectfully submitted, as stated in Justice Marshall's strong dissent, that the denial of certiorari in Baldwin ignores the Court's consistent holdings in Gouled, Lewis and Hoffa, allows

an untenable and overbroad reading of Lewis and Hoffa to stand, and invites the continuation of the most insidious of police practices.

By denying certiorari without opinion this Court has failed to provide adequate guidelines within which the police may operate in undercover settings. In fact, the case is certain to be read by law enforcement officials as removing virtually all constitutional constraints on the use of undercover agents to conduct home searches. By using stealth and deception the police may apparently now do that which the Fourth Amendment flatly forbids -- conduct warrantless searches in citizens' homes without the procedural safeguard of neutral judicial officers determining the existence of

probable cause. Baldwin allows the exception to swallow the Fourth Amendment. The unbridled authority of the police to invade one's home was the very evil which the Fourth Amendment is supposed to have eliminated. Instead, Baldwin has effectively eliminated the Fourth Amendment and unleashed an unlimited arsenal of police ploys which destroy the once sacred rights guaranteed by the Bill of Rights.

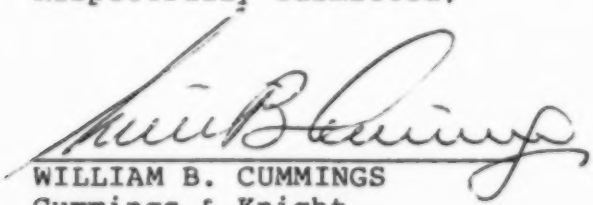
Evidence obtained in violation of a defendant's constitutional rights must be excluded at trial. If police know that illegally obtained evidence will not be admitted into evidence at a defendant's trial, they are less likely to violate his constitutional rights; rather, they will use valid, legal methods of investigation. The

case at bar presents the very type of police abuses which demand application of the exclusionary rule. Mark Neal's search of Eubank's home was unconstitutional. The Fairfax County Police Department's use of the information gleaned by Neal in his warrantless search as the basis for obtaining a search warrant is tainted by the original illegality. The evidence seized pursuant to the execution of the search warrant should have been excluded as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 488 (1963).

CONCLUSION

The Supreme Court of Virginia's refusal of Petitioner's Petition for Appeal being in direct conflict with this Court's decision in Gouled v. United States, and the viability of Gouled being uncertain after this Court's recent denial of certiorari in Baldwin v. United States, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,



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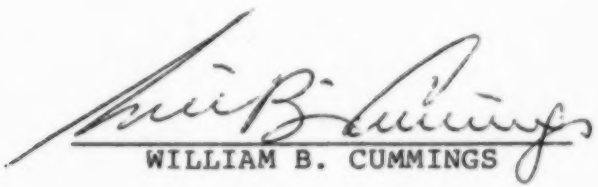
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Certiorari have, this 14th day of December, 1981, been forwarded to James F. Hurd, Esq., Assistant Commonwealth Attorney, County of Fairfax, Courthouse, Room 226, Fairfax, Virginia 22030, by placing same in the United States mail, postage prepaid and properly addressed.



WILLIAM B. CUMMINGS

APPENDIX A

APPENDIX A

EXCERPTS FROM TRIAL TRANSCRIPT

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA vs. FRANK EUBANK, JR. Defendant.	Criminal Nos. 31473, 31474 31833

Thursday, October 29, 1980

The above-entitled cause came on to be heard before THE HONORABLE LEWIS D. MORRIS, Judge in and for the Circuit Court of Fairfax County, in the Courthouse, Fairfax, Virginia, beginning at 10:05 a.m. o'clock.

APPEARANCES:

On behalf of the Commonwealth:

JAMES F. HURD, JUNIOR, ESQUIRE
Assistant Commonwealth Attorney

On behalf of the Defendant:

LIONEL RICHMOND, ESQUIRE

P R O C E E D I N G S

(The Court Reporter was sworn.)

MR. RICHMOND: Your Honor, before the jury comes down, I have a Motion I'd like to proffer to the Court. Could we have the prisoner removed, please?

THE COURT: All right. Guess we'll have to take him back.

MR. RICHMOND: Your Honor, I've already had some feeling about the Court's taking some of these Constitutional Motions, but this is a very serious one and the matter didn't come up until yesterday. Will you recall, Your Honor, the testimony of Mark Neal. And I, specifically, got around to the fact that he testified that around the eighteenth or so of January, he went into Mr. Eubank's house, and under the guise, he said, and the direction of the police department, to make a search of the premises to determine what materials were there, so he could report back to them.

If you remember, I asked him, did they ask you to do that or tell you to do that? Yes. That they would help me with my case, if I would do that.

Your Honor, this is exculpatory evidence. Two things I want to approach this on. One, I'm making a Motion, now, for a

mistrial. A Motion to suppress all the evidence under the search warrant and under the search, on the basis that this was a surreptitious search. Mark Neal, at the time, and in accordance with the affidavit by Cox, says that the informant was at the home of Frank Eubank on 1/19/20 excuse me, Your Honor, 1/19/80, and 1/22/80. The informant was present when the property was stolen, et cetera.

The informant testified on the stand that he was sent in there by the police, for the purpose of determining what was there, so that he could come back and make this report for this warrant.

I submit that what that was, at that time, he was an arm of the police department and that he was the agent of the police department, that he did something that the police could not have done without this surreptitious act. This would destroy the evidence that came under that act. I cite U.S. vs. Hoffa, 387 U.S. 231, 385 U.S. 293, U.S. vs. Roviaro, and Your Honor, I dashed down and got copies of these and I think, if you can just look at them, for this purpose.

* * *

THE COURT: Mr. Richmond, in reading these cases, the two Hoffa cases and the Corngold case and the Roviaro case, I think

all four of those cases are certainly distinguished from this particular case. When you take the extent to which these informants were used in these cases, the relationship of their particular testimony to the conviction of the defendant, and the position that they were in, to me was much more serious than we have here.

* * *

I am going to deny both of the motions, that is, the motion for the mistrial and the motion to suppress the evidence in this case.

MR. HURD: Your Honor, for purposes of the record, the appellate record, that is, if there is one, I would like to indicate that I, as the Assistant Commonwealth Attorney, was not aware of that portion of Mr. Neal's testimony that Mr. Richmond bases the motion on . . . .

THE COURT: All right. You can certainly put that on, for the record, but I am just saying here that when you are reading these four cases submitted, these informers -- the manner in which these informers were used, I could readily understand the position someone would take, but as far as this particular informant, this man's conviction does not rise and fall on Neal's testimony alone.

MR. RICHMOND: This man's -- the evidence that is brought before on this man's trial rises on whether or not the evidence can be produced in the court, and whether or not anything can be said about it.

Now, he was an arm of the Police Department when he went in there. He was an agent of the Police Department when he went in there for that purpose, and he said on the stand that's why he went in there. He used the guise of going in and asking for bond money so that he could get in there to do that.

Now, in other words, they went in and searched the place without a search warrant by using the informant. Now, that is clearly a violation of the Fourth Amendment rights.

THE COURT: I disagree with that, and under the circumstances of this case, I certainly disagree with that, Mr. Richmond. I'll note an exception for you, and I'll deny the motion and note an exception.

MR. RICHMOND: Note my exception, please.

* * *

APPENDIX B

APPENDIX B

EXCERPTS FROM HEARING TRANSCRIPT

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - x

COMMONWEALTH OF VIRGINIA :

: Criminal Docket
-vs- Nos. 31473,
: 31474,
31475

FRANK EUBANK, JR. :
Defendant.

- - - - - - - - - - - - - - - - x

Friday, November 14, 1980

The above-entitled cause came on for hearing, before the HONORABLE LEWIS D. MORRIS, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 12:30 o'clock p.m.

APPEARANCES:

On behalf of the Commonwealth:
JAMES HURD, ESQUIRE

On behalf of the Defendant:
LIONEL RICHMOND, ESQUIRE

P R O C E E D I N G S

(Whereupon, the court reporter was sworn by the Clerk of the Court.)

THE COURT: Let the record show this is a case of Commonwealth of Virginia versus Frank G. Eubanks. Case numbers 31473, 31474, 31475.

This case comes on to be heard to satisfy [sic] the verdict in all three cases. Is the Commonwealth ready in this motion?

MR. HURD: Yes.

THE COURT: Is the defendant ready?

MR. RICHMOND: Yes, Your Honor.

THE COURT: All right, Mr. Richmond?

MR. RICHMOND: Your Honor, I thought in the interest of keeping in balance we should argue the point and then because Item 1 of my motion says verdict on 31474 and 31473 to set aside a verdict is covered and also 31475 is the whole issue on 31475 [the first trial].

I thought I'd take that up and then have an answer on it and then go to Item 2 of my motion. Would that be the way to do it?

THE COURT: That's all right with me, the most expeditious way we can do it.

MR. RICHMOND: Basically, I'm renewing the motion to set aside the verdict in the two cases, 31473, and 31474, and now, make a motion in the case of 31475 on the basis that it's after acquired evidence and such, if Your Honor will recall, the testimony was given on the stand in the trial of the second case on October 28, and 29, and 30 that the chief informant who was the only link between this witness and the purchase of the property was the name and age [sic], of the police department by the statement of the police officer himself of the defendant, not the defendant, but the witness, Mark Neal testified on the stand that he was -- had four or five charges pending on him at the time that he talked with Investigator Cox, and that he was encouraged, if he were going to get in this house and make this search for them that they would help him in the future, which they obviously did by the resulted sentence that he got with the cases that were before the court at this time.

That was the only link that the department had between a right to go in that house, was that informant, and he went in as an agent of the police department as was stated by Investigator Cox on the stand.

He was of the police department nature, as such. I think this comes under the -- certainly in violation of the Fourth and

Fourteenth Amendment of this defendant that there was a surreptitious search. It was a search that the police department themselves could not have done, and if they did not have a basis for the warrant, for obtaining a search warrant by adequate affidavit they could not have even gotten a search warrant, and in this particular case, there was no basis until that entry was made.

When that entry was made at their behest, and the witness himself testified to that effect there was the violation of this defendant's right.

* * *

So, all of these things measured up to the fact that I think, you have to stand back and look at it and say well, in what way does the police department have a right to go into that house without any basis for the search warrant, and when the only basis that they relied was this informant, and they said in there that it was for other reasons that he had helped them, that this particular informant had helped them convict two or three juveniles on some burglaries, et cetera, but that was not the real reason. The real reason is that he was the one that entered the place at their request as their agent in order to substantiate or make the basis for this search warrant, and I say that when that witness entered the house he

was with the police department and as such contrary to the Fourth and Fourteenth Amendment.

THE COURT: All right, Mr. Hurd?

MR. HURD: First off all, Your Honor, The Court already ruled on this. This is a motion Mr. Richmond made when he became aware of this evidence during the trial. The Court already ruled and I don't see that there is any ground for reconsideration. It doesn't make any difference whether Mr. Neal was an agent of the police or not because clearly he had permission of the owner to be in the house as he had been in there many many times before.

This is a common practice that's been among the police department to send someone in who is known to a suspected wrongdoer to the basis for a search warrant. The only time I have heard the phrase surreptitious case is by Mr. Richmond. I've never seen this in a case or that this is improper, and Mr. Richmond cites no case.

For that reason, it's perfectly proper as to whether it should have been devout knowledge to Mr. Richmond. There's no way in the world that is considered exculpatory. It has nothing to do with whether the defendant committed the crimes charged. The crimes had been committed at the time Mr. Neal went in that house, whatever happened

in there is irrelevant as exculpatory evidence. I submit, the motion should be denied on those grounds.

* * *

THE COURT: Let me see the cases you're referring to.

Mr. Richmond, I don't believe the ruling in that particular case would be applicable in this case. I think you have an entirely different situation than the parties involved in that case, than this case. So, I'm going to deny the motion as presented at this time.

* * *

APPENDIX C

APPENDIX C

V I R G I N I A:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 21st day of September, 1981.

Frank Eubank, Jr., Appellant,

against Record No. 810569
Circuit Court Nos. C-31473,
C-31474 and C-31475

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: s/

Deputy Clerk

APPENDIX D

APPENDIX D

V I R G I N I A:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of October, 1981.

Frank Eubank, Jr., Appellant,

against Record No. 810569
Circuit Court Nos. C-31473, C-31474 and C-31475

Commonwealth of Virginia, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on September 21, 1981, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on September 21, 1981, be, and the same is hereby, stayed, to and including the 20th day of December, 1981, on the expiration of which time the same may be enforced, unless the

case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

On further consideration whereof, appellant's motion for reinstatement of bond is denied. Accordingly, the above stay is not to discharge the petitioner from custody.

A Copy,

Teste:

s/Allen L. Lucy

Clerk

APPENDIX E

APPENDIX E

SUPREME COURT OF VIRGINIA

FRANK G. EUBANK, JR.	)	
	)	
Appellant	)	
	)	
	)	
v.	)	Record No. 810569
	)	
	)	
COMMONWEALTH OF VIRGINIA	)	
	)	
Appellee	)	

TO THE HONORABLE THE CHIEF JUSTICE
AND THE JUSTICES OF SAID COURT

PETITION FOR REHEARING

Comes now your petitioner, Frank G. Eubank, Jr., by counsel, and hereby moves this Honorable Court to reconsider its ruling on September 21, 1981, denying petitioner's appeal.

1. Jurisdiction.

Under Rule 5:29 of the Rules of this Court, this Court has jurisdiction to entertain a petition for rehearing its denial of

an appeal if such petition is filed within fourteen days of the denial. Petitioner is filing this petition for rehearing on Monday, October 5, 1981, the fourteenth day after the denial. Thus this petition is timely filed and this Court has jurisdiction.

* * *

3. Reasons for Rehearing.

Petitioner respectfully represents that his appeal should have been granted for the following reasons:

A. The question of surreptitious search raised in petitioner's argument is one that is troublesome to the public, as well as to law enforcement agencies. The acts by the police in this case are no different than would be the case if the police officer had recruited a civilian person such as the United Parcel deliveryman or the gas meter man to circumvent the warrant requirements of the Fourth Amendment. The Fourth Amendment protects one's home and surroundings from unreasonable searches by government agencies, and the sanctity of that rule will be lost if police officers can plot with impunity to circumvent this requirement. Hereafter, a police officer need only have suspicion that a house contain some improper evidence, and then engage the services of the milkman, the gas meter man, etc.,

on a commission basis, to enter the dwelling on the pretext of performing their legitimate duties and look around for something suspicious, and report that to the police officer. Then when the information fits the right niche, the police would proceed with a search warrant to enter and seize that which they have now surreptitiously confirmed is inside the dwelling or building. There is simply no difference at all between sending a salaried police officer or a commissioned surrogate civilian into a dwelling. The search is still being made by the government and without a warrant, contrary to the requirements of the Fourth Amendment. When done, the exclusionary rule requires suppression in the case of the agent as much as it does in the case of the salaried officer.

Exceptions allowed to warrantless searches are few and must remain tightly circumscribed, lest the entire concept of privacy protection be abandoned. This case presents a clear case of overextension of the allowable practice. Unless this Court hears this issue on appeal and delivers an opinion setting forth the guidelines within which the police must operate when using a police agent to conduct a warrantless search the police will be free to circumvent and ignore the Fourth Amendment. The rights of every citizen of this Commonwealth will be jeopardized by the police of Fairfax County and any other jurisdiction in Virginia reading this Court's denial of appeal as a

license to violate the Constitution as long as it is done surreptitiously.

* * *

WHEREFORE, petitioner, Frank G. Eubank, Jr., by counsel, respectfully requests this Court to grant a rehearing of its order denying his appeal.

Respectfully submitted,

s/William B. Cummings
William B. Cummings

October 5, 1981

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 1981, a copy of the foregoing Petition for Rehearing was mailed, first class mail, postage prepaid, to James F. Hurd, Jr., Esq., Assistant Commonwealth Attorney, Fairfax County Courthouse, Room 226, Fairfax, Virginia 22030.

s/William B. Cummings
William B. Cummings

APPENDIX F

APPENDIX F

V I R G I N I A:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 13th day of October, 1981.

Frank Eubank, Jr., Appellant,

against Record No. 810569
Circuit Court Nos. C-31473, C-31474 and C-31475

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 21st day of September, 1981, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/Allen L. Lucy
Allen L. Lucy, Clerk

APPENDIX G

APPENDIX G

V I R G I N I A:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 13th day of October, 1981.

Frank Eubank, Jr., Appellant,

against Record No. 810569
Circuit Court Nos. C-31473,
C-31474 and C-31475

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

On October 6, 1981, came the appellant, by counsel, and filed a motion praying that he be released on bond.

On consideration whereof, the said motion is denied.

A Copy,

Teste:

s/Allen L. Lucy
Allen L. Lucy, Clerk

Opposition

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

DOCKET NO. 81-1096

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK G. EUBANK, JR.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

JAMES F. HURD, JR.
Assistant Commonwealth's Attorney
Fairfax County Courthouse
4000 Chain Bridge Road
Fairfax, Virginia 22030
Attorney for Respondent
COMMONWEALTH OF VIRGINIA
703/691-2776

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1096

FRANK G. EUBANK, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Commonwealth of Virginia, the Respondent, prays that the Petition for Writ of Certiorari be denied.

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STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's Statement of the Case. Additional facts are set forth in Respondent's Argument below.

ARGUMENT

THE CONDUCT OF THE POLICE AGENT INSIDE PETITIONER'S HOME DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

It is of primary importance to accurately characterize the relationship which existed between Petitioner and Mark Neal (hereinafter referred to as "Neal") when Neal entered Petitioner's home in January 1980. The transcript of October 30, 1980, reflects that Petitioner had known Neal for seven years prior to January, 1980, (Pages 65 and 151), and that between August and December, 1979, Neal had been to Petitioner's home on numerous occasions. (Page 159). It is apparent that prior to being arrested by Investigator Cox, Neal had intended to return to Petitioner's residence. (Transcript of Oct. 29, 1980, p. 137). The record of trial further indicates that upon arrival Neal did not misrepresent

himself in order to gain entry into Petitioner's home, but asked to borrow money only after he had entered and had gone downstairs to the basement with Petitioner. He saw the property in question shortly thereafter, when he went upstairs to get a beer from the refrigerator. (Transcript of Oct. 28, 1980. pp. 208-209). In short, Neal did nothing that he had not done on any number of prior occasions.

Petitioner's principal reliance upon Gouled v. United States, 255 U.S. 298 (1921) is misplaced. It is clear that the central issue in that case was the validity of the seizure of evidence in the defendant's absence, not the initial entry by the government agent. Consider the manner in which the Court phrased the relevant question:

> Is the secret taking, without force, from the house or office of one suspected of a crime of a paper belonging to him . . . by a representative . . . of the government, a violation of the 4th Amendment? (Emphasis supplied) Page 305.

Consider further the Court's subsequent language, at pages 305-306, quoted by Petitioner at page 16 of his Petition: reference is twice made to search and seizure. Thereafter, the Court makes reference to the initial entry, but in answering its own question in the affirmative, concludes:

> any search and seizure subsequently and secretly made in (the owner's) absence falls within the scope of the prohibition of the 4th Amendment. (Emphasis supplied) Page 306.

The facts of Gouled have become a standard by which this Court has evaluated the conduct of government agents in several other cases. In Lopez v. United States, 373 U.S. 427 (1963), a government agent

wire-recorded conversations with Lopez in the latter's office. Of the agent the Court said:

> He was in the office with Petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without Petitioner's knowledge. Compare Gouled v. United States . . . Page 438.

In Hoffa v. United States, 385 U.S. 293 (1966), the same language was quoted by the Court in finding no Fourth Amendment violation. In Lewis v. United States, 385 U.S. 206 (1966), Gouled was likewise distinguished from the facts of that case, the Court summarizing its holding in Gouled thusly:

> In the Petitioner's absence, however, the intruder secretly ransacked the office and seized certain private papers . . . This Court had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking. (Emphasis supplied). Pages 209-210.

The Court termed Petitioner's reliance on Gouled "misplaced", as it did, in effect, in Lopez. In United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980, cert. denied, ____ U.S.____, 101 S. Ct. 1767 (1981), the United States Court of Appeals for the Sixth Circuit observed that the evidence in question had been in plain view of one Hoing, an undercover government agent employed by Baldwin, and said, citing Lewis:

> There is no evidence that Hoing ransacked Baldwin's personal belongings in his search for contraband. Page 253.

A review of the cases cited herein reveals that a government agent is entitled to misrepresent himself in a variety of ways to gain entry, whether or not he previously knew the petitioner, and that, once inside, he is entitled to engage in a variety of

activity which falls short of a search and seizure. Gouled simply does not control these cases. Indeed, no case known to Respondent has ever been reversed solely because of an agent's misrepresentation as to identity or purpose. Clearly, therefore, the mere presence of an agent inside a house does not render illegal all that he might do therein. The focus of this Court has consistently been on the nature of that conduct. Compared with the conduct of the agents in each of the cited cases, and with this Court's evaluation thereof, Neal's was clearly not constitutionally impermissible.

The Lewis and Baldwin cases are instructive not only because they are different from Gouled but also because they are similar in some respects to the instant case. In Lewis, supra, the agent was

invited into Petitioner's home for the purpose of conducting an illegal narcotics transaction. The Court characterized Petitioner's home as "a commercial center to which outsiders are invited for purposes of transacting unlawful business." Page 211. In the instant case, Neal was invited by Petitioner into a place which served a like purpose. In fact, upon Neal's arrival, Petitioner was at that moment committing a criminal offense by having stolen property in his possession. Further, once inside the home, Neal was able to see the stolen property in plain view, as had the agent in Baldwin, supra. There is no evidence that he ransacked Petitioner's personal belongings in a search for evidence. He merely observed property which he had delivered there himself as Petitioner's confederate in an ongoing criminal operation,

and which he had apparently seen there shortly before his arrest.

The Baldwin and Hoffa cases, cited herein, also stand for the proposition that

> The Fourth Amendment . . . does not protect wrongdoers from misplaced confidence in their associates. Baldwin, supra, page 253.

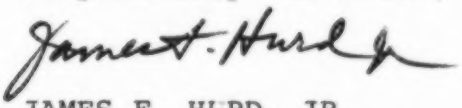
The fact that Petitioner would not knowingly have invited a police agent to share his house does not render Neal's presence there illegal. See Baldwin, supra.

CONCLUSION

Gouled v. United States remains as the benchmark by which is judged the conduct of a government agent who gains entry into a house through misrepresentation. Since that decision was handed down, several attempts similar to that of Peti-

tioner have been made to expand its scope and that of the Fourth Amendment, without success. The law in this area remains settled. Petitioner has failed to demonstrate that this case is so unique as to warrant further review. Consequently, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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